**LAWRENCE HARRIS CONSTRUCTION, INC.**

**VABCA-7219**

**CONTRACT NO. V541C-713**

**VA MEDICAL CENTER
CLEVELAND (BRECKSVILLE DIVISION), OHIO**

***Lawrence Harris***, President, Lawrence Harris Construction, Inc., Cleveland, Ohio, for the Appellant.

***Stacey North-Willis, Esq.,*** Trial Attorney, ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and, ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

## OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

## BACKGROUND

This appeal was docketed on September 15, 2004. Concurrent with the NOTICE OF DOCKETING, the Board issued an ORDER TO SHOW CAUSE why this appeal should not be dismissed for lack of jurisdiction because Appellant's, Lawrence Harris Construction, Inc. (LHC), NOTICE OF APPEAL was mailed more

than 90 days after receipt of the Department of Veterans Affairs (VA or Government) Contracting Officer's (CO) final decision denying LHC's claim for an equitable adjustment under the above referenced Contract. Both parties have filed a RESPONSE to the ORDER TO SHOW CAUSE.

## SUMMARY FINDING OF RELEVANT FACTS

The following are summarized relevant facts based on the Record in this appeal. The Record consists of LHC's NOTICE OF APPEAL letter, accompanied by 15 exhibits, LHC's letter RESPONSE to the ORDER TO SHOW CAUSE and VA's one page MEMORANDUM responding to the ORDER TO SHOW CAUSE. The VA's MEMORANDUM included an exhibit of the Federal Express, "USA Airbill" for the final decision and the "Proof of Delivery" provided by Federal Express for the receipt of the final decision by LHC.

On May 27, 2004, the CO issued a final decision denying LHC's claim of $75,556 and a time extension of 520 days relating to Contract V541C-713 for Mental Health Renovation at the VA's Brecksville Facility. Citing that the final decision was issued "[I]n accordance with the guideline of FAR 33.211(a)(4)," the text of the final decision states the following regarding LHC's appeal rights:

> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken at the following address: [address omitted]. The notice shall indicate that an appeal is intended, reference this decision and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claims procedures for claims of $50,000 or less or its accelerated procedures for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals,

> you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603 regarding Maritime Contracts) within twelve months of the date you receive this decision.
>
> The Department of Veterans Affairs Board of Contract Appeals (VABCA) is the authorized representative of the Secretary for hearing and determining such disputes. The rules of the VABCA are published in section 1.783 of Title 38, Code of Federal Regulation. The address of the Board is 810 Vermont Avenue, NW, Washington, DC 20420.

The CO forwarded the final decision to LHC on May 27, 2004 by facsimile transmission received by LHC on the same date. The CO also sent the final decision by Federal Express "Priority Overnight" package service on May 27, 2004. LHC's President signed for receipt of the final decision from Federal Express on June 3, 2004.

LHC mailed its appeal to the Board on September 9, 2004, by use of U. S. Postal Service Express Mail, 105 days after receipt of the final decision at LHC's place of business by facsimile and 98 days after LHC's acceptance of the Federal Express delivery of the final decision.

LHC is a small, disadvantaged business concern qualified under the Section 8A program of the Small Business Administration.

## DISCUSSION

Federal Acquisition Regulation (FAR), Subpart 33.211(v) requires a final decision to contain a paragraph "substantially" conforming to the language set

forth in the Subpart. That language, in relevant part, states as follows:

> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals.

The issue confronting us in determining whether or not we have jurisdiction is defined by the extent to which the final decision fails to conform to the FAR language. The issue arises from the failure of the final decision to inform LHC of the imperative that an appeal to this Board must be made within 90 days of the receipt of the final decision.

The FAR instruction to inform a contractor of the time period within which to appeal to an agency board of contract appeals derives from the provisions of Sections 5 and 7 of the CONTRACT DISPUTES ACT OF 1978, 41 U.S.C. §§ 605, 606, which prescribe that a final decision must apprise a contractor of its appeal rights, including the right to appeal to an agency board of contract appeals within 90 days of its receipt of the final decision.

It is clear that appeal rights statement in the final decision in this case was "defective" and it is equally clear that LHC did not "mail or otherwise furnish" its appeal to this Board within the statutory 90 days.

The CDA 90 day window to file an appeal following receipt of a final decision is a statutory waiver of sovereign immunity that must be strictly construed. We are without the power to waive the limitation. ***Cosmic Construction Co. v. United States***, 697 F.2d. 1389 (Fed. Cir. 1982)

However, if the final decision fails to properly apprise a contractor of its appeal rights and a contractor detrimentally relies on that improper notice and fails to file a timely notice of appeal, the 90 day limitation does not commence. ***Decker & Co. v. West***, 76 F.3d. 1573 (Fed. Cir. 1996)

In the case at bar, it is clear that the final decision was defective in its failure to inform LHC of the 90 day CDA limitation. LHC avers:

> The final decision of the Contracting Officer, dated May 27, 2004, did not indicate that we had Ninety [*sic*] days to file this appeal with the Board of Contract Appeals. The final decision stated that instead of appealing to the board of appeals, [*sic]* Lawrence Harris Construction may bring action directly in the United Sates Court of Federal Claims within 12 months of the date we received this decision.

Prior to ***Decker***, we had uniformly held that a defective final decision tolled the running of the 90 day appeal limitation. ***Specialty Transportation, Inc.***, VABCA-No. 6211, 00-2 BCA ¶ 30,978; ***Select Contracting, Inc.***, VABCA-No. 4541, 95-2 BCA ¶ 27,630. In ***George Ledford Construction, Inc.***, VABCA-6630, 02-1 BCA ¶ 31,662, we examined ***Decker*** and the precedent on which ***Decker*** relied to determine that:

> However, where there is no contracting officer's final decision or the decision otherwise lacks "critical" or "essential" information, under a reading of ***Pathman*** [***Pathman Construction Co. v. United States***, 817 F.2d 1573 (Fed. Cir. 1987)] and ***Decker*** a showing of detrimental reliance is not required. ***George Ledford Construction***, at 156,442.

In ***Ledford*** we confronted a circumstance where the final decision merely advised the contractor that it had the right to appeal under the contract's DISPUTES clause and provided no information as to when, where or how an appeal could be taken. While in this case the final decision fails only to provide the "when" of the appeal rights equation, that deficiency is no less a "critical" defect than the defects we found in ***Ledford***.

Since the failure to provide the information on the 90 day appeal limitation was a critical defect, we need not determine if LHC detrimentally relied on the failure to provide the information. Thus, because the final decision here was critically defective, the 90 day CDA limitation did not commence and LHC's appeal is timely.

We note, in addition, that LHC is a small disadvantaged contractor, presumably less experienced in dealing with the intricacies of the procurement process and LHC indicated it did not realize it was dealing with a 90 day deadline to appeal. Were it necessary, LHC's detrimental reliance on the defective final decision is established to our satisfaction.

## DECISION

For the foregoing reasons, we hold that we have jurisdiction over the appeal of Lawrence Harris Construction, Inc., VABCA No. 7219, under Contract No. V541C-713.

DATE: **November 8, 2004**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

WILLIAM E. THOMAS
Administrative Judge

PATRICIA J. SHERIDAN
Administrative Judge